Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

NO. 95-64

IN THE

Supreme Court Of The United States

OCTOBER TERM 1994

JOHN DAVIS, on behalf of himself and all others similarly situated,

Petitioners,

v.

STATE OF ALABAMA, PERRY O. HOOPER, SR., LARRY ROE, JAMES D. MARTIN, AND ALL ALABAMA PROBATE JUDGES, SHERIFFS, AND COUNTY CLERKS IN THEIR OFFICIAL CAPACITIES, *et al.*,

Respondents.

BRIEF IN OPPOSITION BY RESPONDENTS LARRY ROE, PERRY O. HOOPER, SR. AND JAMES D. MARTIN

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August 14, 1995

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QUESTIONS PRESENTED

1. Is there a right under the Fourteenth Amendment to prevent State election officials from systematically altering past election practices after voting is completed to include absentee ballots normally rejected?

2. Does a federal district court lose jurisdiction under the *Rooker-Feldman* doctrine over the claims of a class of voters, presented by persons affiliated with one political party, where a State court issues an order against the political party?

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STATEMENT OF THE CASE

A. Introduction

This case seeks review of an interlocutory order of the U.S. District court for the Southern District of Alabama. The decision was affirmed by the Eleventh Circuit, which attempted to utilize the certified question process to obtain guidance from the Alabama Supreme Court on the meaning of an Alabama statute.

Petitioner Davis has been to a Justice of this Court once before on this same case seeking a stay of proceedings in the District Court in May 1995. That request was denied.

The case remains pending in the District Court, with discovery complete (except for an effort by Petitioner Davis to obtain mandamus relief from the Eleventh Circuit). Trial is scheduled for September 19. As one would expect, discovery has produced a great deal of additional information relevant to the case, however, because it is not part of the record in this case, it is not referenced here.

B. Statement of Facts and Course of Proceedings in the Lower Courts.

Respondents believe there is a need to correct inaccuracies and omissions contained in Petitioner's Statement of the Facts. In fact, Petitioner's statement is significantly argumentative, and we respond here (rather than in some other section) to facilitate comprehension of the conflicting perspectives.

1. This litigation began in federal court to assure that records were preserved for state law election contests in the Chief Justice's and Treasurer's races.

It is wrong to suggest that the procedural history of this case began in the Circuit Court of Montgomery

County, Alabama. This case began in the U.S. District Court in Mobile, Alabama, on November 16 with the filing of an application for temporary restraining order to require preservation of election records for use in a state election contest. The Plaintiffs included Perry Hooper, Sr. and James D. Martin, Republican candidates for Chief Justice and Treasurer,[1] respectively, who had sought a similar order the week before in the Circuit Court of Shelby County, Alabama. Though Hooper and Martin had obtained an order from the Shelby County court, it had been ignored by many state election officials.

Furthermore, an Alabama statute strips the state courts of jurisdiction "to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute . . . ." *Ala. Code* § 17-15-6 (1987). The *statute* also directs state officials not to comply with any order of this kind from a court. *Id.*

When Plaintiffs' filing occurred in federal court on November 16, 1994, in addition to Hooper and Martin, Larry Roe was a Plaintiff. They sought relief on behalf of a class of qualified voters seeking to protect their right to vote under the U.S. Constitution. The class was not identified as limited to persons of any political party. Plaintiffs requested preservation of election records, including the absentee ballot records. R1-1-1. The Defendants were state election officials. Petitioner Davis was not a party, and counsel did not include any attorney of the Republican Party.

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[1]Plaintiffs disagree with footnote five of the Petition. It is not undisputed who is due to be Treasurer. As of this writing, on the record before the courts below, Martin could win if the absentee ballots were in his favor sufficiently. There is nothing in the record about who the Governor appointed when the term of the previous Treasurer expired, or why he acted as he did.

Later the same day, Petitioner John Davis filed an action in the Circuit Court of Montgomery County, Alabama, under the style *Odom v. Bennett,* No. 94-2434-R (15th Jud. Cir., Ala. Nov. 16, 1994). He sought relief on alleged state law grounds against the Secretary of State and state election officials for their practice of refusing to accept for counting certain absentee ballots — those contained in "affidavit envelopes" which were not witnessed by two persons or not notarized. In essence, he claimed that the notary/witness provision of *Ala. Code* § 17-10-7 (1987) were not mandatory.

The Republican Party was not named as a defendant by Davis. Similarly, Hooper, Martin, and Roe were not named as defendants.

The federal court announced from the bench its intention to enter relief on the afternoon of November 17, after hearing live testimony from persons who had observed the state of election records preservation. In addition, there was testimony that at least some election officials had refused to allow challenges to absentee voters, and these officials had separated absentee ballots from their "affidavit envelopes."

Within hours after the District Court's hearing was concluded, on November 17, Davis obtained a hearing in his state court action. That evening, the state court ordered unwitnessed, unnotarized absentee ballots counted in supplemental fashion and thereby undertook to change the electoral results. The Republican Party intervened in that proceeding using the counsel of Algert S. Agricola, Jr., who was *not* at that time counsel in the pending federal action. Agricola participated in the hearing convened by the state court on the evening of November 17, even though the Republican Party filed no pleading.

On November 18, the District Court issued its first written order. The order directed county election officials to

preserve election records intact, and further specifically ordered the Defendants to refrain from altering any absentee ballots, related affidavits or certification of results. R1-5-4. The relief was ordered statewide because of the potential effect on the Chief Justice's and Treasurer's elections of loss, destruction or alteration of records by *any* county. A hearing was set on the motion for preliminary injunction for December 5. R2-139-40, 145, R3-172-73. At this point, Secretary of State Bennett was not a party in the U.S. District Court.

Despite the November 18 order of the District Court, election officials in at least 30 counties undertook to count the defective absentee ballots and change their certifications of results. App. at 22a n.7; R3-55-56 (Bennett). These results were transmitted to Bennett, whose responsibility it is to certify elections of state officials. *See Ala. Code* § 17-14-20 (1987).

On November 23, these supplemental county certifications came to the attention of the District Court, and the judge notified Bennett by telephone that he must not certify any results using absentee vote totals altered by county officials pursuant to the Montgomery action. R3-74 (Bennett). A written order amending the court's prior temporary restraining order was issued later on November 23. R1-8-1. The amended order specifically gave Bennett notice of the prior order and directed him not to use altered certifications from county officials in certifying results. It also enjoined him not to certify the results of the Chief Justice's election or the Treasurer's election pending the December 5 hearing on the motion for preliminary injunction. R1-8-1.

Later on November 28, Mr. Agricola, counsel for the Republican Party, entered an appearance on behalf of Hooper, Martin and Roe in U.S. District Court. R1-19-1. He did not appear on behalf of the Republican Party.

On November 28, Plaintiffs amended their Complaint to allege claims against Bennett, in his official capacity, and to seek preliminary injunctive relief against him directly. R1-9-3. Petitioner Davis was also added as a party defendant and as the class representative for the same class of persons on whose behalf he had brought the Montgomery action, *Odom v. Bennett*. R1-9-3.

The Amended Complaint elaborated on the factual grounds for relief based on violations of the U.S. Constitution. Among other things, Plaintiffs asserted that the post-election change in practices for defective "affidavit envelopes" would cause their votes to be diluted by absentee ballots, not previously considered qualified, in election results in violation of the First and Fourteenth Amendments. Plaintiffs sought an order prohibiting the counting of those ballots by any of the Defendants and prohibiting the inclusion of them in any certification of results issued by Bennett.

2. *The evidence at the December 5 hearing showed without dispute that unwitnessed, unnotarized absentee ballots had not been counted under state practice prior to the post-election state court order.*

At the December 5 hearing, there was substantial, undisputed evidence of the State's longstanding, statewide practice as to the rejection of unnotarized, unwitnessed ballots.

Plaintiffs presented the testimony of Secretary of State Bennett and his *1994 Election Handbook* (6th ed.) made available to election officials throughout the State's 67 counties. The handbook described standard election practice for disqualifying certain absentee ballots in unnotarized, unwitnessed affidavit envelopes:

> The task of absentee poll workers on election day falls into two phases. Beginning at noon (or

> later) they are to open the affidavit envelopes, review the affidavits, and deposit the plain envelopes in a sealed ballot box.
>
> *If, upon examination, the affidavit is not properly witnessed or notarized,* is not signed by the voter, or does not otherwise contain sufficient information to determine that the person is a qualified elector and is entitled to vote absentee, *the ballot should not be counted* [Attorney General's opinion 80-00551]. Otherwise, the ballot should be deposited into a sealed ballot box.

R3-51-53, PX 8. (emphasis added).

The Attorney General's opinion which is cited described the same practice included in the *1994 Election Handbook.* R3-50, PX 7. Indeed, the words are nearly verbatim the same:

> If, upon examination, the affidavit obviously does not comply with Alabama law; that is, if it is not properly witnessed or notarized, is not signed by the voter, or does not otherwise contain sufficient information to determine that the person is a qualified elector and is entitled to vote absentee, the ballot should not be counted. Otherwise, the ballot should be deposited into a sealed ballot box.

Id., Ex. 7 at 3.

Bennett testified that "until the Circuit Court ruled in Montgomery," his office relied on the 1980 Attorney General opinion relating to the noncounting of absentee ballots accompanying defective affidavits. R3-51. Bennett also testified that it was his "understanding that ballots that are not witnessed by two people over the age of 18 or notarized are not counted prior to the Montgomery County Court case." R3-54.

Also introduced into evidence at the December 5 hearing was the testimony, from the Montgomery County ac-

tion, of Vicki Balough, an election analyst for the Secretary of State for the last six years. R3-162, DX 1, R-69 to 73. Balough explained that, during the tenure of the most recent three Secretaries of State, the State has given instructions to local election officials "not to count [absentee ballots] votes where there was no notary or two witnesses." *Id.*, R-70-71, 73.[2]

Particular county officers, poll officials or poll workers corroborated this testimony about past practice involving absentee ballots. R3-153-55 (Huffman, Bullock County); R3-89-90 (McEarchern, Mobile County); R3-95-96 (Mason, Greene County); R3-162, DX 1 (R-38 to R-39, Hackett, Montgomery County); R3-105-06 (Grods, Wilcox County).

Davis introduced as evidence the entire record in *Odom v. Bennett,* which he had filed three weeks earlier, and in which he had introduced evidence of a need for temporary relief to require inclusion of unwitnessed absentee ballots.

Based on this evidence, the District Court made findings that past practice of state officials was (i) not to count unwitnessed, unnotarized absentee ballots, and (ii) not to certify election results using such ballots. The court also found that the Secretary of State was under an order from the state court in *Odom v. Bennett* to include

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[2]Obviously, the purpose of the requirement that absentee ballots be notarized or witnessed is the prevention of fraud and promotion of the integrity of the election. R3-61-63 (Bennett). The Court received further testimony from Bennett that absentee ballots exceeding 6% to 7% of the total votes cast was an alarming total. R3-60-61 (Bennett). In one county, Greene, approximately 33% of the votes cast were from absentee voters. R3-61 (Bennett). To place these percentages in proper perspective, it should be explained that Alabama restricted absentee voting only to those who were out of the country on election day or were sick or otherwise physically unable to go to the polls. *Ala. Code* § 17-10-3 (1987).

such ballots in certifying election results. App. at 164a. The District Court's conclusions of law were grounded on interpretation of the First Amendment and the Fourteenth Amendment's Due Process Clause; despite what Petitioner writes, at 7, there was no reference to a right to disenfranchise Davis in the District Court's conclusion. In one very real sense, the evidence showed that Davis disenfranchised himself by not following a clearly established and long-followed rule and practice for absentee voting. The District Court order related only to the certification of results, which determined who takes office pending the resolution of any "contest" in the legislature pursuant to *Ala. Code* § 17-15-50 (1987).[3]

The District Court found that the harm suffered by the Plaintiffs would be irreparable. If the disputed absentee ballots were counted, they would be separated from their accompanying affidavit envelopes, and mixed with the "ocean" of regularly counted ballots. In such condition, the ballot is not identified with a particular affidavit envelope, and secrecy is preserved. *See Ala. Code* § 17-10-10 (1987). However, there would be no way to purge the

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[3]At this point in the presentation of the evidence, there was no indication one way or the other whether the absentee ballot of anyone other than Davis reflects the vote of a real, living citizen, and whether any of the ballots are otherwise fraudulent. However, so many absentee ballots were cast in Greene County (33% of the vote total) there are serious questions about whether ballots there are fraudulent. App. at 26a n.13. The record contains testimony about the absentee ballot of a comatose nursing home patient, R.122-28, and of a Bullock County voting rights activist, who attributes the rise in absentee voting, in recent years, to fraud. Despite the Davis class claim, Petition at 7, there is evidence that would justify the conclusion of actual fraud, although the claim for relief on which the Court of Appeals premised its holding does not depend on such a conclusion, but instead on a conclusion that the *Odom* order would work a patently unfair, retroactive change in election practices after the election was over.

votes on these ballots once they were included in certified totals. The Davis Class ballots were not shown to suffer any similar harm by remaining uncounted pending any election contest, and thus the secrecy of votes contained in those ballots would remain intact. The District Court's preliminary injunction thus preserved this existing *status quo*. App. at 166a-167a.

By agreement, the District Court's order preserving election records was allowed to remain in place. R2-167-168.

3. The Eleventh Circuit proceeding affirms the District Court's order but refused to allow an order requiring results be certified, pending trial on the merits.

Petitioner Davis attempted, on appeal, to include evidentiary materials not before the District Court on December 5. These materials suggested that, in two Alabama counties, during November 1994, officials had not followed the past practice of refusing to count unwitnessed, unnotarized absentee ballots.

The Eleventh Circuit affirmed, but modified the relief by directing no certification of results in the Chief Justice's or the Treasurer's race in the preliminary injunction. App. at 32a. The panel was unpersuaded that any factual dispute existed as to liability on the record before the District Court. The panel noted that, four days after the District Court's preliminary injunction, the Montgomery state court amplified its prior TRO by elaborating on its reasons for the November 17 order and determining that it had jurisdiction despite the bar of *Ala. Code* § 17-15-6. App. at 21a n.9.

The Eleventh Circuit believed that Section 17-10-7 required, on its face, notarization or witnessing, but certified a question of state law to the Alabama Supreme Court to determine whether its reading was correct, in

light of the *Odom v. Bennett* decision. The court was reluctant to reach a final decision when the proper application was muddled, and a "reasonable alternative course of action exists." App. at 29a. Plaintiffs objected to certification, citing, among other things, the obvious difficulties of a court ruling on a case with such a direct impact on one of its own members. *See also, Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So. 2d 702 (1967).

4. The Alabama Supreme Court Justices' response to the certified question criticizes the Eleventh Circuit, and attempts to alter the record facts.

Petitioner gives only a short discussion to the opinion from the justices in response to the certified question. Petition at 10. There are significant omissions here as well, and they seem important.

In responding to the certified question, only five of nine justices of the Alabama Supreme Court participated. Two recused, App. at 102a-111a, two gave no indication of participating, only four comprised the decision-makers, App. at 102a, App. at 112a, 194a, and one dissented.

Plaintiffs objected to any of the remaining justices who had contributed financially to the campaign of the Chief Justice, and not his opponent Plaintiff Perry O. Hooper, Sr., during the last weeks of the campaign. Plaintiff claimed that three of the remaining five were so involved, and that a fourth justice was a campaigner with the Chief Justice in the November election. Accordingly, *Ala. Code* § 12-2-14 (1987) required appointment of a special court by the Governor. These four justices rejected the motion to disqualify or recuse and refused to allow appointment of a special court; they advised that the contributions "reflect collegial courtesy expressed in a time before this controversy arose." App. at 102a.

Plaintiffs also explicitly reserved adjudication of federal constitutional questions for the federal courts. However, not only did the Alabama justices respond to the certified question, they also nevertheless issued opinions about the federal issues, and relied on additional affidavits not before the Eleventh Circuit. The justices obtained the affidavits by a unilateral order to the state circuit court in *Odom v. Bennett* to transmit them, as there was no appeal filed by anyone in that case. The affidavits were apparently filed in the state court largely *after* the Eleventh Circuit issued its January 1995 opinion. App. at 69a & n.12.

As for the federal issues addressed, the Alabama justices told the Eleventh Circuit that it had decided the *Rooker-Feldman* issue incorrectly. App. at 64a. The Alabama justices said that the Republican Party was the same as the Plaintiffs in the District Court because some of the Plaintiffs were candidates of that party and pointed to the fact that one of the lawyers was the same as the lawyer for the Republican Party. App. at 64a. The Eleventh Circuit was also criticized at length for intervening in what the Alabama justices chose to characterize as a "garden variety" election dispute concerning the marking of ballots, which is reserved for state election contest tribunals. App. at 55a-64a.

Justice Maddox dissented at length. App. at 112a-135a. He explained that Alabama statutes on absentee voting were clear on their face, and that the Eleventh Circuit could have decided the federal claims without deference to the Alabama Supreme Court. App. at 114a. He further expressed the view that, under the jurisdiction-stripping statute *Ala. Code* § 17-15-6, the Montgomery state court lacked jurisdiction over the case. App. at 132a. He did not address the federal issues, but advised he should not be understood as agreeing with the opinion of the other four justices. App. at 135a.

The answer to the certified question was filed on or about March 14, 1995. Plaintiffs objected to the answer, and did so largely on the grounds discussed above.

5. The second Eleventh Circuit opinion affirmed and remanded for additional fact-finding after Alabama opinion was received.

After the answer was provided, the Eleventh Circuit accepted supplemental briefs from the parties and issued directions to the District Court as to factual inquiry to be undertaken. It directed as well that "a speedy trial" be provided, and rather than failing to give any explanations of any legal issue, as Petitioner contends, the court cited its prior legal discussions in *Roe v. State of Alabama,* 43 F.3d 514 (11th Cir. 1995), and reminded the litigants "to determine the practice in Alabama regarding the counting of contested absentee ballots prior to the November 8 election," and "what effect, if any, the contested absentee ballots had on the outcome of the elections for Chief Justice and Treasurer." App. at 8a.

In connection with issuance of the second opinion, the court did not attempt to address any of the criticisms by the Alabama Supreme Court. However, Judge Edmondson no longer appeared to be in dissent or insistent on dismissal of the case out of respect for state court processes.

The case is pending in the District Court. Discovery has ended, except possible examination of absentee ballots pursuant to a mandamus request in the Eleventh Circuit by Petitioner Davis. Trial is scheduled for September 19.

REASONS FOR DENYING THE WRIT

This case has given new meaning to the word "ballot box stuffing." It is a sophisticated meaning, which uses

judges to attempt to give it legitimacy. It is a case about a brazen attempt on the part of supporters of the incumbent Chief Justice of the Alabama Supreme Court and certain members of the state judiciary to change the voting rules after the election is over, thereby salvaging the re-election hopes of that Chief Justice. One federal district court judge has indicated that this attempt "personally repulsed" him.[4] The district court judge in the proceedings below described this attempt as "abominable" and "contemptible."[5]

Despite Petitioner's attempt to mischaracterize this case, the controversy here is not an "ordinary dispute over the counting and marking of ballots." It is not a case involving "garden-variety election irregularities." It is a controversy over whether the State of Alabama, through certain members of its judiciary, can deliberately and systematically adopt and retroactively apply a statewide change in its voting laws and practices after an election is over and its results before known. If the State is allowed to do this, there will be a "patent and fundamental unfairness" in the conduct of the elections for the offices of Chief Justice and Treasurer of the State of Alabama, clearly implicating the First Amendment and Fourteenth Amendment rights of the Plaintiffs and the voters they represent.

The preliminary relief was issued by the District Court and the Eleventh Circuit to prevent the misuse of absentee ballots, a misuse that could not be corrected without risks to the secrecy of the ballot. This was the proper balance of the equities, and a fair way to protect voting

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[4]*Bradford v. State of Alabama,* CV 94-PT-2816-M (N.D. Ala. 1994), Memorandum Opinion dated November 25, 1994 issued by Judge Robert B. Propst, at p.7. R1-27, Ex. 5.

[5]See Transcript of December 5, 1994 hearing in the District Court. R3-170-171.

rights for all citizens, as well as a sense of decency about democracy in Alabama.

1. Wise judicial economy counsels against review because of the interlocutory character of the decisions below.

The writ should be denied because the decisions below are not final. Trial on the merits is set for September 19. A full and complete record will be available in the event appellate review is sought after final judgment, and there are no unusual factors which justify a grant of certiorari at this juncture. Judicial resources will obviously be preserved for efficient use if any review here is delayed until after a final judgment is rendered.

2. There is no conflicting decision of any other court which justifies review of the preliminary injunction.

Petitioner's claim to the high ground of federalism is too amorphous to give the action of the lower courts any significance beyond the incredible, unique circumstances surrounding it. The likelihood that another state judge, and the justices of a state supreme court, would attempt such a post-election change of rules, is too remote to justify further review. It is most unlikely that anyone would repeat the errors in judgment reflected by three financial contributors to the campaign of the affected Chief Justice, in the issuance of the opinion claimed to be in conflict with the Eleventh Circuit. In other words, the disposition of this case in the courts below reflects a proper balance of the tension between the need to prevent patent, fundamental unfairness under First and Fourteenth Amendments as well as the Supremacy Clause *and* the need to restrain against involvement in state electoral affairs.

Fundamentally, the lower courts were acting to preserve democratic government against a systematic, deliberate statewide change of voting rules *after* the election was concluded. Surely, this preservative action is at the core of the due process clause and the equal protection clause of the Fourteenth Amendment, and is a proper effort to guarantee the rights and privileges of national citizenship. *See Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886) (voting "preservative of all rights"); *United States v. Saylor,* 322 U.S. 385, 389 (1944); *Reynolds v. Sims,* 377 U.S. 533, 554, 555-62 (1964); *Griffin v. Burns,* 570 F.2d 1965, 1075 (1st Cir. 1978); *Duncan v. Polythress,* 657 F.2d 691, 703 (5th Cir., Unit B 1981), *cert. dismissed,* 459 U.S. 1012 (1982) (attempt to change rules on filling judicial vacancies). Their intervention was limited and justified.

Such a view of the rights at stake in no sense conflicts with any other decisions cited by Petitioner at 13-14, 16-17; all are "garden variety" election disputes over the marking of ballots. None rises to a level of systematic or structural problems with a state election.[6]

Petitioner highlights *Pettengill v. Putnam County R-1 School District,* 472 F.2d 121 (8th Cir. 1973). Not only is Petitioner wrong in his comparison of *Pettengill* and the case at bar, in point of fact, the complete lack of meaningful similarity in the acts complained of in *Pettengill* and those complained of in the present case merely serves to highlight the true nature of what is involved in the present case. In *Pettengill,* there were 116 electors who

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[6]*Hutchinson v. Miller,* 797 F.2d 1279, 1283 (4th Cir. 1986), *cert. denied,* 479 U.S. 1088 (1987); *Curry v. Baker,* 802 F.2d 1302 (11th Cir.), *cert. dismissed,* 479 U.S. 1023 (1986); *Partido Nuevo Progresista v. Barreto Perez,* 639 F.2d 825 (1st Cir. 1980), *cert. denied,* 451 U.S. 985 (1981); *Pettengill v. Putnam County R-1 School Dist.,* 472 F.2d 121 (8th Cir. 1973); *Hubbard v. Ammerman,* 465 F.2d 1169 (5th Cir. 1972), *cert. denied,* 410 U.S. 910 (1973); *Powell v. Power,* 436 F.2d 84 (2d Cir. 1970).

cast absentee ballots which were void because of irregularities in the application, delivery or execution of these ballots. 472 F.2d at 122. The Eighth Circuit Court of Appeals repeatedly referred to these problems simply as election "irregularities." *Id.* at 121-122. It rejected the plaintiff's claims as a request for it to become an "arbitrator of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots." *Id.* at 122.

In complete contrast to *Pettengill*, the present case involves a deliberate, systematic, statewide change in election rules and practices — and an attempt on the part of state officials to implement such a change after the election was over. There is no way to describe the effect of the *Odom v. Bennett* decision as a mere irregularity.

Petitioner's effort to differentiate this case from other systematic changes of practice cases is also unavailing. None of the cases purports to authorize a systematic statewide post-election change of rules, which rules could have induced people not to seek to vote or altered campaign strategies. Distinguishing *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981), ("PNP"), the Eleventh Circuit noted that no one except the voters who mismarked their ballots in that case could have been disenfranchised unfairly by the post-election change, as no one is likely "to have acted to their detriment by relying upon the invalidity" of ballots with marks outside the ballots' drawn rectangles. App. at 28a. By contrast, here, the state court ordered a change of practice, which prior practice clearly was relied upon. App. at 28a (noting that supporters of Hooper and Martin may have declined to vote, or candidates declined to solicit votes, because of the inconvenience of obtaining witnesses or notarization). Therefore, the change of

rules has an unfair effect on potential voters and candidates in the 1994 election who relied on them.[7]

Plaintiffs therefore believe no conflict exists between the decision below and decisions in other circuits.

3. The gratuitous expressions on federal law by the Alabama Supreme Court justices are not of sufficient authority so as to amount to a conflict with the Eleventh Circuit's opinion which this Court needs to resolve.

Petitioner attempts to claim a conflict in lower court decisions arising from the expressions about federal law made in responding to the certified question under Rule 18 of the Alabama Rules of Appellate Procedure. *See* Petition at 14. These expressions are mere *dicta,* as nothing in that rule purports to authorize issuance of controlling decisions on federal law. Not surprisingly, in view of the abstention doctrines out of which the procedure emerges, the rule speaks only about state law. *Accord, Ala. Const.,* amend. 328, sec. 6.02 (conferring original jurisdiction "to answer questions of state law certified by a court of the United States").

Furthermore, the decision was so lacking in procedural regularity as to be unworthy of the label "judicial." It could qualify as a campaign memorandum, being pre-

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[7]It is also noteworthy that, like *Griffin, Brown v. O'Brien,* 469 F.2d 563, 569 (D.C. Cir.), *vacated as moot,* 409 U.S. 816 (1972), and *Briscoe v. Kusper,* 435 F.2d 1046 (7th Cir. 1970), the case at bar involves a post-election change which could have been pursued long before the election. The fact that it was not triggers the same concern as was expressed in *Griffin,* namely that "voters' grievances concerning an election [ought], when possible, to be aired prior to the election. '[C]itizens having grievances may not lay by to see how the election will turn out before complaining.'" 570 F.2d at 1075 (quoting *Toney v. White,* 488 F.2d 310, 315 (5th Cir. 1973)). In contrast, the grievance over the mismarked ballots in *PNP* could not have been aired before they were mismarked.

pared by three financial contributors to the re-election bid of the then Chief Justice. The decision may itself be violative of due process of law as the product of judges who have a direct pecuniary interest in the dispute. *See, e.g., Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821-25 (1986) (holding that the participation of a justice with direct, pecuniary interest violated a party's due process rights).

A. The procedural history of this case recited in the Alabama opinion is seriously flawed.

The Alabama justices' opinion is grounded on such a misperception of the procedural history of this case, as shown by the record, that it could be deemed to refer to a factually different case from the one at bar.

The most egregious miscasting of this history is in the characterization of the Plaintiff parties in the litigation. On several occasions, parties filing suit, on behalf of interests distinct from the Republican Party, are characterized as "Republican." Plaintiff Larry Roe, suing on behalf of *all* qualified voters, R1-1-2, is described as "a voter who voted for these Republican candidates [Hooper and Martin]." App. at 45a. In truth, nothing in the record shows for whom Roe voted, and, as one would expect, no one even asked him during the December 5 hearing in the District Court. R3-132 to 135.

The opinion also goes to great lengths to show the involvement of overlapping counsel in several cases, and even this effort misdescribes the true history. For instance, on pages 12 and 13, the opinion asserts that attorneys Johnston and Druhan, who signed the original Complaint in the case at bar, "represented parties in the U.S. District Court for the Northern Division [sic]." Presumably this refers to the action where Bradford sued in the Northern District of Alabama. This is an incorrect

understanding, as Johnston and Druhan were not in the *Bradford* case. Furthermore, none of the briefs on the certified question even attempted to describe which counsel represented which party in the litigation preceding the December 5 action of the District Court for the Southern District of Alabama.

In addition, the opinion implies that the Complaint in this case was filed after the ruling in *Odom v. Bennett* on November 17. App. at 45a-46a. In fact, the Complaint was filed on November 16, *before* the *Odom* case began.

Accordingly, the expressions of opinion about federal law and federal jurisdiction are based on an incorrect understanding of the history of this, and related, litigation. These expressions provide no basis for changing course at this stage of this case.

B. The Alabama opinion misdescribes the record evidence in the Odom case.

The opinion also mischaracterizes the record in *Odom v. Bennett*. The opinion makes the erroneous claim that the record there is "undisputed." Indeed, the evidence presented by *Davis* in the *Odom* case on the night of November 17 *was* "undisputed," in favor of Plaintiffs' claim here. It was undisputed to the effect that the general, statewide practice has been to reject unnotarized, unwitnessed absentee ballots, just as the District Court found in its hearing.

For some reason, however, the four justices chose to make no mention, in their opinion, of this undisputed testimony. They chose not to mention the testimony of Vicki Balough, an election analyst for the Secretary of State for the last six years. Ms. Balough explained at the temporary restraining order hearing in the *Odom* case during the night of November 17, 1994, that, during the tenure of the most recent three Secretaries of State, the

State has given statewide instructions to local election officials "to not count [absentee ballot] votes where there was no notary or two witnesses." R3-162, DX1, (R-71, 73). Balough's testimony was provided to the District Court by attorneys for Davis when they introduced the record in the Montgomery action to the District Court. R3-162. The four justices also chose not to mention in their opinion the testimony of the other three witnesses who testified in *Odom v. Bennett* on November 17, all of which was consistent with Ms. Balough's testimony. R3-29-33, 38-39, 42-43, 46 (Circuit Clerk of Montgomery County); R3-49-55 (Bullock County poll watchers); R3-55, 57-59 (Chief Clerk, Montgomery County Probate Court).

Furthermore, in claiming that certain matters in the *Odom* case show a non-uniform practice in counting absentee ballots, the opinion neglects to mention that those facts conflict with the original *pleadings* of Davis in the Montgomery action. R3-162, DX1. Those pleadings assert a statewide practice of refusing to count unwitnessed absentee ballots and those pleadings purport to join election officials throughout the state using Montgomery County officials as representatives of a defendant class. *Id.* Moreover, Davis obtained an order using such pleading, making such assertions of statewide practice, but now seeks to repudiate his own prior position. In addition, the November 17 order of the court in the *Odom* case refers to a statewide practice of not counting unwitnessed absentee ballots. R3-162, DX1, at R-84 to 88. The portion of the *Odom* record upon which the four justices rely is limited to affidavits developed largely *after* the Eleventh Circuit's January 1995 decision.

Similarly, the statements of fact made in the opinions are not binding here, even under the Alabama Supreme Court's own decision. The Supreme Court of Alabama wrote about itself, three days *after* responding to the Eleventh Circuit: "[T]he certified question procedure does

not place this Court in a position of making factual findings . . . ." *Ericsson GE Mobile Communications, Inc. v. Motorola Communications and Electronics, Inc.*, No. 1931189, 1995 WL 111910 (Ala. March 17, 1995). Whatever may be said about the impact of the factual references in the Alabama justices' opinion, they may not even be writing about the same case as was before the Eleventh Circuit.

C. The Alabama opinion misunderstands basic procedural issues.

Incredibly, the Alabama opinion asserts that, because the three-judge panel in *Bradford v. State of Alabama*, CV-94-PT-2816-M, an action which was brought under Section 5 of the Voting Rights Act, refused to hear constitutional claims similar to those raised by the Plaintiffs in this case, *Bradford* is *res judicata* as to this Court's consideration of the Plaintiffs' claims. App. at 50a, 55a. Aside from the fact that the three-judge panel convened in *Bradford* had no jurisdiction over these constitutional claims once "preclearance" was given by Justice Department lawyers, the four-justice opinion also ignores the fact that the United States District Court for the Northern District of Alabama ultimately dismissed Mr. Bradford's constitutional claims *without prejudice.*

In commenting on the notice of the December 5 hearing in this case, the opinion also overlooks the absence of any objection by Davis to the December 5 hearing on Plaintiffs' due process claims. Indeed, the opinion suggests that the Defendants objected to consideration of the due process claims, App. at 52a-53a, & n.10, when actually Davis did *not* object and the other Defendants abandoned any objection they may have had at one time. The absence of any objection from Davis was not surprising, as he had been litigating over the counting of unwitnessed absentee ballots since November 16 in the

Odom case, and also in the case known as *Bradford v. State of Alabama,* since November 18.

The Eleventh Circuit's remand of the case for trial on the merits would certainly be sufficient to "get the facts straight," and show no conflict with its own decisions which might warrant this Court's review, at least not at this stage where the only orders are interlocutory.

4. The Rooker-Feldman *doctrine was no bar to jurisdiction of the District Court.*

The Eleventh Circuit was correct in finding that the obligation to appeal decisions of state courts to the U.S. Supreme Court, known as the *Rooker-Feldman* doctrine, is no bar to action by the District Court. For numerous reasons, the Petition reflects an incorrect view of application of the *Rooker-Feldman* doctrine, and related doctrines of abstention. Also, it has not been shown to be in conflict with any other circuit court decision, or is otherwise so important as to justify review.

The *Rooker-Feldman* doctrine directs federal courts not to sit in review of the final judgment of a state court. It is based on the statute providing for appeal of state court judgments to the U.S. Supreme Court. 28 U.S.C. § 1257. In the case at bar, there is no final judgment or decree implicated in the *Odom v. Bennett* state court order.

Second, the Eleventh Circuit correctly noted that the Plaintiffs here are not even parties to the *Odom* case, and they cannot be said to have had a reasonable opportunity to present their constitutional claims in that case. App. at 24a. This is even more true in light of the hurried nature of the temporary injunction hearing conducted by Judge Reese during the night of November 17, 1994. Indeed, the violation of Plaintiffs' constitutional rights, which gave rise to the District Court's preliminary injunction, did not even occur until the state court issued its Order.

Thus, the federal constitutional rights at issue in this case were not even part of the *Odom* case, and were not considered by that state court, so far as to create an obligation on the part of Messrs. Roe, Hooper and Martin, or the voters they represent, to intervene. *See Wood v. Orange County,* 715 F.2d 1543, 1546-47 (11th Cir. 1983); *Martin v. Wilks,* 490 U.S. 755 (1989); I*n Re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1498 (11th Cir. 1987) (no privity between association and its members where association appeared in prior proceeding).[8]

Petitioners point to appearance here of counsel for the Republican Party in the *Odom* case, but that hardly provides a reasonable basis for application of the doctrine. In the abstention doctrine, dubbed "closed-related" by Petitioner, at 15, common counsel is not enough. Neither are similar business activities and problems. Instead, they must be demonstrated "in terms of ownership, control, and management" for even these other abstention doctrines to apply. *Doran v. Salem, Inc.,* 422 U.S. 922, 928-29 (1973).

This should be all the more true for a political party. As rancorous as political associations are, as tentative as political coalitions and agreements are (even intra-party agreements), common membership seems too thin a reed on which to conclude that the Plaintiffs are the same as those in the *Odom* case. It would be particularly odd given that Plaintiffs are class representatives for all qualified voters, not just Republicans. Similarly, the interest of a candidate, with his own interests and needs, are

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[8]Plaintiffs filed this suit before the *Odom* case began, and even if the parties were the same, *Ala. Code* § 6-5-440 (1993) has long barred the state courts from proceeding in the face of a prior pending federal action. *See Terrell v. City of Bessemer,* 406 So. 2d 337 (Ala. 1981); *Johnson v. Brown-Service Insurance Co.,* 293 Ala. 549, 307 So. 2d 518 (1974).

obviously *not* the same as those of his political party.[9] In a nutshell, Petitioners have a strangely monolithic view of political party organization, and it should not be sufficient to justify preclusion of an action by these Plaintiffs.

To the extent that the *Rooker-Feldman* doctrine is designed to prevent undue interference by federal courts in state affairs, it is material that the State, itself, takes the position that there is no unnecessary intrusion in its affairs by virtue of the exercise of jurisdiction by the lower courts in this case.

Finally, and perhaps most saliently, the opinion of this Court in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 483 (1983), actually supports Plaintiffs' position in this issue. In *Feldman,* the plaintiff was challenging a pre-existing state action — in that case, a pre-existing rule which denied admission to District of Columbia bar applicants unless they had graduated from approved law schools, regardless of any special or extenuating circumstances. 460 U.S. at 465-70. If this rule was unconstitutional, it was unconstitutional at the time it was challenged in the District of Columbia Court of Appeals. In other words, a "case" had already arisen within the meaning of the Constitution because a "question respecting the Constitution, treaties or laws of the United States [had] assumed 'such a form that the judicial power [was]

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[9]In *Marks v. Stinson,* 19 F.3d 873, 885-86 n. 11 (3d Cir. 1994), *cert. denied sub nom, Dougherty v. Marks,* 115 S.Ct. 901 (1995), the Third Circuit refused to conclude that prior state proceedings barred actionable federal challenges for several reasons. First, the parties were different, in some respects. Second, the state proceedings did not reach the merits of the constitutional claims. The panel wrote: "[T]he district court could (and did) find that Marks' . . . fraud and constitutional claims had merit without also finding that the court of common pleas erred when it dismissed their proceedings." 19 F.3d at 886 n. 11. Similarly, this action should not be deemed an improper appeal of a final judgment of a state court.

capable of acting on it.'" *Id.* at 478 (quoting *In re Summers*, 325 U.S. 561 (1945)).

Feldman does not represent a case where the District of Columbia Court of Appeals "look[ed] to the future and chang[ed] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* at 479 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 216 (1908)). Nor did the court "engage in rulemaking." *Id.* (quoting *Summers*, 325 U.S. at 566). "Instead, the proceedings before the District of Columbia Court of Appeals involved a 'judicial inquiry' in which the court was called upon to investigate, declare, and enforce *'liabilities as they [stood] on present or past facts and under laws supposed already to exist.'" Id.* (quoting *Prentis*, 211 U.S. at 226) (emphasis added). In his District of Columbia court action, Feldman questioned the fairness of the pre-existing rule and made explicit legal arguments against it based on the Constitution and on federal antitrust laws. *Id.* at 479-80. As the *Feldman* Court emphasized, *"[a]ll of this was done against the background of an existing rule." Id.* at 480 (emphasis added).

In the case at bar, however, the gravamen of Plaintiffs' case is that the *Odom* case ordered a new rule, or at least a new practice, which was the equivalent of engaging in "rulemaking." While the *Feldman* Court was "called upon to investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist," the state court was asked to change the existing rules pertaining to the counting of absentee ballots. Thus, it was not until the state court ruled as it did, entering a temporary restraining order requiring a change in practice and in state rules, that a "case" arose within the meaning of the Constitution and the laws of the United States. No cause of action against the State existed before that.

Petitioner cites no authority alleged to be in conflict with the Eleventh Circuit decision, except the Alabama Supreme Court's answer to the certified question. As shown above, there are numerous reasons why the Alabama opinion should not be deemed to be a conflict that needs resolution by this Court.

CONCLUSION

For these reasons, the writ should be denied.

Respectfully submitted,

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